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REGULATING THE MEDIUM: REACTIONS TO NETWORK NEUTRALITY IN THE EUROPEAN UNION AND CANADA

By Daithí Mac Síthigh

The complex issue of “network neutrality” is difficult to separate from a range of market, cultural, and technological debates, with possible legislative and administrative action under consideration in the United States, Canada, and the European Union. Academic interest, as is often the case, pre-dated political discussions, with a strong US focus over the course of the last decade, including Wu’s early definition of the issue, while Lessig’s 2001 *The Future of Ideas*, mostly concerned with copyright and related issues, gave some space to the issue that we now recognize as part of net neutrality.¹ However, the topic has, in the period between these early warnings and the time of writing, become one of the most recognizable controversies in the policy and law of Internet media,² and the subject of detailed studies.³ It has a particularly high profile in the United States, being the subject of regular pronouncements by presidential candidates during the

2008 campaign, not to mention numerous unsuccessful legislative proposals.⁴ More recently, one particular FCC action was reviewed by the DC Circuit Court of Appeal,⁵ and the Commission published in December 2010 its report and order, *Preserving the Open Internet: Broadband Industry Practices*, after a lengthy consultation process.⁶ The well-known issue is that of whether providers of Internet connectivity to consumers and others (i.e., broadband providers, whether “traditional” standalone Internet Service Providers (ISPs), cable companies, or other) should be prevented from restricting or differentiating the services and content available to end users.

While the debate is conducted at various levels, and there are differing definitions of what exactly is being proposed or opposed, those who favor legal support for net neutrality argue that the State should prevent ISPs from restricting the content received by subscribers or favoring content providers. Opponents typically fall into two camps: (1) those who argue that legislation is unnecessary as consumer and/or economic behavior will prevent abuse and (2) those who argue that the ISP should be able to act in this way as a matter of its own discretion to provide services to consumers as it sees fit. Normally, the ISPs will argue that supporting high-bandwidth content is resource-intensive, although claims that the Internet is close to the breaking point are overstated, with capacity growing at or slightly ahead of the same speed as use and overall demand falling significantly short of the available connectivity, with peak utilization of resources still under 50 percent.⁷ In particular, it is suggested that ISPs would, in the absence of an explicit prohibition, enter into financial agreements with content providers (with whom they normally would have no direct business relationship) so that the ISP could defray its costs and the content provider could be assured that its services would be accessible to the ISP’s customers.

In this contribution to the growing literature on this important topic, the expression-related elements of net neutrality are considered, including a case study of Ireland, highlighting the broad powers enjoyed by ISPs, and discussing whether the problem is a genuine one. While noting that the matter has been the subject of various publications by a sizeable number of US scholars, space is then given to comparing the state of the debate in Europe, Canada, and the United States, drawing on principles of telecommunications law.⁸ It is argued that the link between

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telecommunications and media regulation is at the heart of the net neutrality debates in Canada and (to a lesser extent) the European Union, and that the non-applicability of certain US doctrines in these jurisdictions (due to different market conditions and the established role of competition law) does not mean that regulatory or legislative action is unnecessary. Finally, it is contended that the consideration of net neutrality in the context of important social and political debates regarding speech, plurality, and innovation is a better approach than one focused on ex post identification of the most egregious examples of discriminatory practices.

SPEECH AND THE ISP

CONTEXT

It is immediately clear, though, that a nuanced approach to cyberlaw is more necessary than ever, if the problems raised are to be analyzed and dealt with without hysteria or confusion. In that context, given that freedom of expression is a factor within the debate, and indeed has, on a number of occasions, become a key issue of public interest, it is relevant for the purposes of this study. In particular, the role of the ISP in controlling the content accessed by users, for whatever reason, is a difficult and controversial one. It becomes more significant where services and data are Web-based and assuming always-on connections, and demand for video requires faster and better connectivity. Indeed, it has been argued elsewhere that Web 2.0 innovation is encouraged by the end-to-end principle, therefore suggesting that a modification to end-to-end is in practice opposition to this model of innovation.⁹

Within the broader question of pricing for access and the rights and wrongs of such a system, advocates of net neutrality legislation often point to what are argued to be examples of abuse of power by service providers as justification for legislative intervention. This approach is not dissimilar to the arguments regarding web hosts made by the present author and by others.¹⁰ So for example, when the pro-choice group NARAL was refused permission to use a “short code” SMS facility provided by large carrier Verizon, this was pointed to as an example of the dangers of allowing unregulated service providers to pick and choose between content providers, thus regulating,

in practice, not just the communicative rights of the provider but the actual content received by the consumer.¹¹ To its credit, Verizon Wireless responded and said that the policy was out-of-date and reversed its decision, but certainly it is apparent that such incidents do not assist the ISPs and telecommunications industries in opposing any regulation under the net neutrality banner. Before continuing to look at the details of the net neutrality debate, then, it is necessary to apply the same analysis to ISP censorship as a general principle as the author has done in respect of Web 2.0 hosts, though noting that this issue is a broader one than net neutrality, despite its influence on the perception of the intentions of the ISP.

OFFENSIVE SPEECH

In order to examine the gap between legal standards and ISP-driven standards, we note here the position of “offensive speech,” which is also applicable, in some regards, to the problems of Web site hosts discussed previously. The ISP, though, normally starts from a position of greater legal certainty, especially in jurisdictions where ISPs and hosts are treated differently for the purposes of intermediary liability. Courts, and not just the US Supreme Court, have been at pains to point out that guarantees of freedom of expression extend to some speech that may be considered offensive.

The phrases are familiar to all concerned: in the context of challenges to statutory prohibitions on the burning of the US flag, Brennan J wrote that “if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹² Similarly, in the European Court of Human Rights, it long has been held that freedom of expression is “one of the essential foundations of a [democratic] society” and, subject to the restrictions contained in the text of the convention, applies not only to information and ideas that are “favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.”¹³

These resonant phrases are familiar to the student of law and frequently are quoted in general or political contexts. But compare them with the Verizon rule that was at issue in the NARAL controversy: reserving

the right to deny service when the customer “seeks to promote an agenda or distribute content that, in its discretion, may be seen as controversial or unsavory to any of our users.”¹⁴ Another example is the policy of AT&T that, before a rapid amendment, banned the use of AT&T facilities by customers in a way that “tends to damage the name or reputation of AT&T, or its parents, affiliates and subsidiaries”¹⁵ (which could lead to the immediate termination or suspension of access), or even the decision of Canadian ISP and telecommunications operator Telus to prevent its subscribers from accessing the Web site of the trade union representing its own workers during an industrial dispute.¹⁶ In all three cases, it is the reservation of the right to determine appropriateness that is the subject of criticism, particularly when such reservation is compared with broad claims as to the value of offensive speech in judicial approaches to such.

By way of a case study outside of the well-documented jurisdiction of the United States, consider the case of Ireland, a small jurisdiction, a member of the European Union, and a nation with strong technology and information industries. Eircom is the largest ISP in Ireland,¹⁷ accounting for 60 percent of DSL (broadband) connections. It has two versions of a policy on offensive speech. The first has been applicable since dial-up connections were available; the acceptable usage policy (which also applies to broadband customers) states that:

Customers may not use *eircomnet* services to create, host or transmit offensive or obscene material, or engage in activities, which would cause offense to others on the grounds of race, creed, or sex.¹⁸

The second policy forms a part of the terms of use of the broadband service, and appears to reach even further than the original policy:

Customers may not use the Facility to create, host or transmit offensive or obscene material, or engage in activities, which are likely to cause offence to others on any grounds including, but not limited to race, creed, or sex.¹⁹

What is of particular concern here is that the well-meaning language does appear to go far beyond the terms of the legislation applicable in this area,

the Prohibition on Incitement to Hatred Act, 1989. This Irish version of “hate speech” legislation, which creates an offense in section 2 of uttering or publishing statements that *are* “threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred,” is of course more extensive than what would be constitutionally permissible in some jurisdictions. Nonetheless, a statement that may not be a violation of applicable Irish laws could still be a violation of Eircom’s policy and thus not permitted to be “create(d), host(ed) or transmit(ted)” via what is, for many users, the only effective provider in town; the majority of consumers in broadband-enabled areas are using DSL connections where Eircom is dominant, although there has been an increase in alternative methods over the recent periods (cable, wireless, etc.).

In Ireland, there is a textually narrow guarantee of freedom of expression.²⁰ It has led to very few successful constitutional challenges, with only one statutory provision ever struck down based on this article as repugnant to the Constitution (and over 90 statutes or provisions of statutes have been so struck down since 1937), and that was a relatively ancient provision relating to begging in the Vagrancy Act.²¹ Things are changing, though. Article 40.6.1(i) has been relied on in other cases and in the refusal of injunctive relief, and in *Mahon v. Post Publications*,²² Fennelly J outlined that the courts “do not pass judgment on whether any particular exercise of the right of freedom of expression is in the public interest” and that no justification other than “freedom of expression itself” is necessary. He even noted that the pursuit of profit or “less noble motives” did not pose a problem for this doctrine. So while the Irish courts are extending the protection of freedom of expression, removing threats of State intervention, individuals must see that freedom filtered through the terms of use of a private ISP. This is, to say the least, a mixed message regarding the state of speech for Irish new media producers.

Even with a diversity of providers, the situation may not change all that much. Certainly, even a brief survey indicates that other Irish providers have similar policies, with the most successful cable ISP, UPC forbidding in its acceptable usage policy the “transmission of email to any person containing offensive or abusive language” and postings that contain offensive or abusive language.²³ Geography

is quite significant here as, despite Internet-without-borders rhetoric, the “last mile” even in an advanced-capitalist, deregulated, democratic state, is typically a local wired ISP, wifi hotspot, or mobile broadband provider.²⁴ Furthermore, where policies are adopted across the providers in a jurisdiction, there may be no choice at all—a convergence or standardization of restrictions, perhaps—even though such policies typically go beyond the legal requirements in a given country according to initial research regarding ISPs in Europe and the United States.²⁵

Commercial ISPs are, perhaps unsurprisingly, more likely to impose additional restrictions on user behavior, even those that initially had few restrictions, with AOL being an example of a successful, mainstream player that did not restrict “hate speech” until 2000.²⁶ Eircom, too, did for some time defend the industry and their users against an even greater threat, that of court-ordered mandatory filtering (to be carried out by ISPs in accordance with the instructions of the recording industry) that seems inconsistent with EU law on this matter. Nonetheless, the argument made by Eircom in its first responses of the filtering challenge (that it is akin to common carriers not deserving liability) is potentially weakened by its range of activities that are wholly inconsistent with the common carrier tradition.

REACTIONS

In the context of the Verizon dispute discussed at the outset of this article, the argument of Yoo, a prominent opponent of net neutrality, that government should not regulate to solve such a dispute (“[you] might find text-messaging companies competing on their openness policies”)²⁷ seems too optimistic. A note of reality is struck by Solove, who suggests that, in the context of social networking, relatively obscure dispute-handling procedures are rarely a consideration for consumers, which therefore cannot lead to meaningful competition based on policies.²⁸ Indeed, in the United States, over 75 percent of residential broadband is cable or DSL (just a few years ago, it was 90 percent of residential users, although the use of mobile telephones with full Internet access is now having an impact), and looking at those zip codes where one or the other is available, it can be observed that between a quarter and half of the districts in recent years have had either no competition

or a choice between two providers.²⁹ However, the focus of the expression-related debate within net neutrality is typically on general interference with the free distribution of content, rather than one-off decisions to punish customers or disable access to content.

Recent arguments in the United States have included reference to the “First Amendment rights” of telecommunications companies as a reason to oppose or be skeptical about net neutrality. Along similar lines, Sunstein criticized the use of the First Amendment by mainstream players in the US television industry (in opposing public interest obligations for digital television broadcasters) and draws links between the use of the First Amendment in this context and the use of the Second Amendment (the right to bear arms) by the National Rifle Association. He concludes that the constitutional arguments are invoked “in order to give a veneer of principle and respectability to arguments that would otherwise seem hopelessly partisan and self-interested.”³⁰ Of course, the pleading of constitutional rights is not confined to the purest of the pure (many important cases in criminal law, for example, may stem from an individual’s desire to be released from prison or found not guilty of an offense rather than their commitment to a philosophical concept of liberty), but the arguments made by Sunstein and others do serve as a reminder to engage in a debate of principle, and an analysis of the purpose of freedom of expression rather than a purely legalistic approach that could indeed come to a sudden conclusion based on particular understandings of the relevant constitutional right.

It does seem, on a more practical note, that ISPs making such arguments appear to be a little confused in their advocacy (as Eircom was in the Irish situation), as they have argued for many years (and are supported by section 230 of the Communications Decency Act in the United States) that they are not “speakers” or “publishers” in the context of cases brought against them for content distributed via their network. So can they realistically make an argument that they have expressive rights in the content that they have argued is not “theirs” for many years? Similar criticisms have been expressed regarding Google’s apparent dual status as deserving First Amendment protection as a speaker and immunity as a neutral, algorithm-based intermediary.³¹

NETWORK NEUTRALITY—A GLOBAL DEBATE?

EUROPEAN UNION

The debate on net neutrality in Europe was somewhat slower in getting underway, although some European commentators urged that non-US interests follow and play a role in the US debates, as decisions made in the United States will have an impact on European users.³² There have been some controversies over ISP behavior, particularly Virgin in the United Kingdom, who engage in significant “throttling” (applying artificial bandwidth restrictions to heavy users) and are introducing specific restrictions on BitTorrent; others such as Plus.net have published “priority” policies that set out the status of various categories of service (such as “gaming” and “VoIP”), though not (yet) specifically branded services.³³

To date, the behavior of European ISPs has been subject to EU regulation through the various telecommunications directives (including the Framework Directive and the associated directives on Access and Interconnection and Universal Service),³⁴ in particular those relating to access and interconnection that deal explicitly with Internet-related activities. Support also is found in Article 102 of the Treaty on the Functioning of the European Union, which could mean that discrimination in favor of a related company (e.g., in the net neutrality hypothetical of an ISP favoring content originating in a subsidiary) attracts attention under antitrust law, although this has not been tested in a relevant context to date, so we must rely on general principles, such as those set out in the Commission’s notice on access agreements published in 1998.

In this statement, three examples are given: (1) refusal to grant access to A where it is granted to B, (2) refusal to grant access at all (essential facilities) and (3) withdrawal of access.³⁵ The Access Directive has a role to play too. In both cases, though, it cannot be said for certain that the concepts here are applicable entirely to the conveying of content,³⁶ especially where there is no established market for contractual agreements between content providers and ISPs, as there can be in conventional disputes within the telecommunications industry. Furthermore, there are hurdles that must be overcome even in the case of the Access Directive, where significant market power

must be found, and this is far from established in the case of ISPs restricting user access to content. The main obligations on network providers are to negotiate (e.g., for interconnection), though with backstop powers for national regulatory authorities in certain circumstances.

PEERING AND UNBUNDLING

Indeed, some commentary discusses the role of IP peering and transit arrangements (which are the legal relationships that enable, in practice, Internet content to flow freely without the need for multiple contracts between users and upstream providers) in possible situations of discrimination,³⁷ although the connection between the negotiation of these arrangements and the regulation of media content is not a common one. Notably, the cost of peering expressed in terms of MB continues to fall, and it is argued by analysts that there has been a shift in the relationship between content providers and ISPs, challenging the understanding of both sets of arrangement.³⁸ On the other hand, the regulation of satellite and cable TV, including difficult issues such as electronic program guides (EPGs) has seen substantial regulatory intervention and critical comment.³⁹ Furthermore, we should take care to recognize the difference between the regulation of Internet service providers under telecommunications law in the two jurisdictions.⁴⁰

In the United States, the FCC’s position can be ascertained from a number of sources. In general, broadband Internet access is classified as an “information service” rather than a “telecommunications service” for the purposes of the Communications Act, a major restriction on FCC powers.⁴¹ The most important test of such is the ruling of the Supreme Court in the *Brand X*⁴² case, which finds that existing legislation does not require the Commission to facilitate local loop unbundling in the case of cable broadband access. Under the approach set out in the earlier 1980 *Computer II* decision, the Commission has the option to, but is not required to regulate aspects of what were then called “enhanced” services. Since then, telecommunications operators were required by the FCC to provide facilities-based access to others in respect of Internet access (which, at the time, was essentially dial-up access to the early Internet and similar services). Following *Brand X*, it did not take

long for the Commission to determine, in the 2005 Wireline Broadband Order, that DSL should be similarly classified as an information service not subject to further duties,⁴³ and this decision was upheld on appeal in 2007.⁴⁴

Telecommunications services, for example, are subject to various common carrier requirements through mandatory regulation, while information services are not. The ultimate goal for the Commission is regulating all broadband Internet access services in the same way, although the extent of such regulation remains unclear and certainly, the common regulation is not as common carriers or anything quite like it.⁴⁵ On the other hand, initial indications are that IPTV is considered to be cable television in the United States. In *Office of Consumer Counsel v. Southern New England Telephone*,⁴⁶ AT&T's service was found, on the basis of its primarily one-way character, to be subject to the Communications Act and other provisions. The successful argument was that it was necessary for duties and obligations to be shared by all providers, and that it would be unjust to allow AT&T to perform the functions of a cable TV operator without being subject to any restrictions. This will undoubtedly add a further element to the net neutrality discussions.⁴⁷

However, the European Union approach includes both unbundling and wholesale "bitstream" provisions, and the designation of aspects of DSL broadband as affected by significant market power is important here. This means that there is a diverse range of providers of broadband Internet access in many areas, joined by access through cable networks (which is not presently subject to the access requirements of DSL). This recalls the point presented above regarding significant market power, meaning that it would be harder to engage EU law on this point given the range of providers. The optimist would add that this means that there is no problem.

SEPARATING THE MEDIUM AND THE MESSAGE

Problems with regard to the lack of system-wide regulation of European media are relevant here. Aspects of European broadcasting law are the subject of harmonization (most recently through the Audiovisual Media Services Directive), with an approach rooted in "technological neutrality" now

being included in legislative instruments, replacing earlier versions where the medium of transmission was significant for the purposes of regulatory classification. So while the prospect of an US-style net neutrality squabble breaking out at the EU level is not a guaranteed one, the ability of the Internet media sector to respond to such developments may be compromised by the Commission's perception of audiovisual media services as divorced from the networks over which they are carried. On the other hand, there is a reminder in the Framework Directive, albeit in a recital, that the preferred approach of separating the regulation of content from the regulation of transmission does not "prejudice taking the links between them into account."

Indeed, the network neutrality matter has been on the table for some time. A 2006 Commission consultation on "content online in the single market" asserted that "the Internet is currently based on the principle of 'network neutrality,' with all data moving around the system treated equally."⁴⁸ The document noted the proposal "being floated" that this could change, and asked for responses. Surprisingly, not many individuals, business or organizations took up this challenge, and those that did (consumer groups, software providers, etc.) opposed a change to the purported net neutrality principle that presently prevails in Europe. However, the polarization (and consequent focus) of the European stakeholders on the question of "whether content should be regulated" during the passage of the Audiovisual Media Services does pose a threat, in that the questions relating to the role of telecommunications and Internet service providers may be neglected. There also is the more technical, but still important, question of the designation of markets as relevant for the purposes of EU telecommunications law; certainly, there are aspects of net neutrality that would not fall within the currently selected relevant markets and therefore, if the matter was to be resolved through the electronic communications framework, further designation could be necessary.

More recently, Commissioner Reding argued (in a 2008 speech)⁴⁹ that networks and access are of "crucial importance," and that neither the Commission nor national regulatory authorities would accept abusive or anti-competitive behavior in the area of traffic prioritization. However, Reding's statement should be considered as a skeptical view of the legislative

approach, for three reasons. She suggests that the debate thus far can be seen as part of disputes between ISPs and content providers on financial matters, she points to the existing package of “helpful tools” in the regulatory framework, and finally (and most importantly) in a number of parts of the statement it is suggested that consumers and providers will be able to determine the fate of this matter: “it will be up to the consumers to decide to change to a provider that offers them what they would like,” and “if one supplier seeks to restrict user rights, another can enter the market with a more ‘open’ offer.” We can see here how, even by the standards of the Commission, this is identified in the tradition of hands-off market-driven telecommunications regulation, and the cultural dimension of network neutrality has not been recognized.

We can also note, in reading the 2008 communication on future networks (which contains a reference to net neutrality),⁵⁰ how the Commission relies on the very general provisions of the Universal Service Directive. Indeed, the Commission’s proposed amendments were cast so as to be focused on transparency rather than full engagement with possible ISP misbehavior.⁵¹ The Commission also points to what are now articles 101 and 102 of the Treaty as preventing problems from arising in Europe, which again suggests a lack of willingness to engage in specific *ex ante* regulation.

In the process of the discussion of the Universal Service Directive, a gap appeared to have opened up in late 2008 between the European institutions, specifically relating to article 22 of the Directive, which currently deals with quality of service, albeit to a very limited extent. The main support comes from content providers such as Google,⁵² and the opposition comes from telecommunications operators,⁵³ as would be expected, although the Commission also has been criticized for paying any attention to this issue, which was said to be a distraction from the more serious issue of increasing access to the Internet in underserved nations, particularly in the southern and eastern member states.⁵⁴ The issue was to what extent the Directive would provide either for Commission or national regulatory agencies to set minimum requirements, including (as some would have it) the prevention of the slowing of traffic or the degradation of service. This can be understood as an additional element of existing QoS oversight

and is welcomed (to some extent) by a number of parties.

However, the most audacious attempt was that of the European Parliament, which proposed allowing (or requiring) national regulatory authorities to take measures to “ensure that the ability of users to access or distribute lawful content or to run lawful applications and services of their choice is not reasonably restricted,” or various versions of this.⁵⁵ This approach, extremely close to the FCC’s articulation of broadband policy in the Four Freedoms statement and subject to the same sort of caveats, was resisted by the Commission. The result was a requirement in Directive 2009/138 that national regulatory authorities be able to enforce a minimum quality of service, coupled with additional obligations on service providers regarding transparency or disclosure, but certainly not a provision requiring member states to prohibit the controversial activities implicated in net neutrality debates.

This debate has been joined to one regarding whether various forms of action should be permissible by way of supposed sanction for breach of copyright (the “three strikes” graduated response that has proven controversial in France), with aspects of each making their way into the respective bundles of amendments. The result of that particular debate was a commitment in a single amending Directive 2009/140 to allowing some restrictions on end-user activities, subject to various caveats based on fair procedures and fundamental rights. The Commission refers to this as an “Internet freedom” provision, but its scope has been questioned by some campaigners.

Finally, in terms of specific references to net neutrality, the matter also became the subject of a specific “Declaration” appended to the package of legislative changes, noting the importance of the “open and neutral character of the Internet,” and promising regular monitoring and a report before the end of 2010. Although disappointing some by falling outside of the formal legal text, the extent of the commitment is still more than might have been imagined when net neutrality was, for all intents and purposes, a US-specific issue. The European Commission first published a questionnaire,⁵⁶ and then reported few current problems, confidence in existing law, agreement on treating fixed and mobile services alike, but some disagreement regarding ‘managed services’.⁵⁷ A parallel process is underway in the United Kingdom,

with regulator Ofcom appearing to focus its energies on transparency-type questions, while also seeking information on specific examples of discriminatory activities, but suggesting that such would only be present where an operator with substantial market power acted in support of its own activities.⁵⁸ As anticipated by the Directive, Ofcom does not appear minded to prohibit or seriously restrict traffic management.

NET NEUTRALITY IN CANADA

In Canada, the CRTC also dealt with the network neutrality issue in a fairly serious way, both as an aspect of broader policy discussions and in its own right. There is little enthusiasm on the part of the relevant ministers to enact legislation, although Geist argues trenchantly that the position of the major Canadian telecommunications firms means that the dangers associated with non-neutrality are both serious and possibly imminent.⁵⁹ Indeed, as noted above, it was a Canadian telecommunications carrier and ISP (Telus) who provoked one of the earliest recorded net neutrality disputes, when it prevented its subscribers from accessing the Web site of the trade union representing its own workers during an industrial dispute.⁶⁰ Although this was resolved with haste, subsequent events in Canada have provoked a discussion of possible policy responses, despite initial skepticism that the issue was one for government at all. Documents disclosed under freedom of information law show how Industry Canada supported a “market forces” approach and advised the Minister against supporting a policy response.⁶¹

The CRTC issued a forbearance order relating to ISPs in 1999 (following its New Media report that also led to a New Media Exemption Order exempting “Internet broadcasting” from regulation for the time being), and does not regulate the rates charged to customers—although it does retain the ability to act against unjust discrimination and undue preference under the Telecommunications Act. In the *Perspectives* report,⁶² a review of developments since the 1999 new media orders, the interaction between this state of affairs and ISP behavior was summarized, noting “increased discussion, research and regulatory investigation” into the actions of ISPs, and not just in Canada.

Indeed, in 2008 the Canadian Association of Internet Providers (CAIP), representing non-incumbent ISPs, urged the CRTC to prevent Bell

Canada from traffic shaping/throttling. This refers to Bell’s actions in identifying peer-to-peer traffic during certain hours of the day and lowering the priority given to such packets across its network—not unlike Virgin’s position mentioned above. The motivation for the CAIP complaint was that their member ISPs buy Internet access (wholesale) from Bell for resale to their own customers and thus they were in practice required to sell Bell policies despite disagreement with or consumer complaints about such.⁶³ This was a relatively limited set of proceedings, not capable of dealing with all issues due to the specific nature of the complaint and the necessary restrictions that such entails, and the CRTC ultimately dismissed the complaint in November 2008.⁶⁴ However, in a June speech, the chair of the CRTC referred to these proceedings and suggested that a broader consultation on net neutrality was an option before it,⁶⁵ and this consultation was launched on the same day that the CAIP/Bell decision was announced.⁶⁶ ISPs, though, continued to insist, in the context of the regulation of new media, that they play a “passive role” in delivering new media content. In its 2009 statement on net neutrality, the CRTC set out a number of principles, taking different approaches to wholesale and consumer services and deferring a final decision (which was ultimately the same decision in substance) regarding mobile networks to a later date.⁶⁷ As in Europe, emphasis was put on transparency and the provision of information to consumers, while also avoiding any forthright criticism of the principles of traffic management *per se*.

How these issues developed is of quite some importance to Canadian media regulation. The high-bandwidth content that acts as a trigger for certain net neutrality issues often is, by its nature, the same type of content that was recognized in the New Media Exemption Order as coming under the statutory definition of broadcasting and resembles, replaces, or competes with fully regulated TV and radio services. In the United Kingdom, the BBC’s wildly popular iPlayer service (allowing UK users to view and download (with restrictions) TV programs already broadcast) has prompted ISPs to issue statements of concern over the burden it places on their networks;⁶⁸ the CBC in Canada has already experimented with some peer-to-peer distribution. Indeed, the issue already has been aired in the context of the CRTC’s review of new media, with content

creators expressing concern that ISP traffic management would limit the development of Canadian new media content accessed via the Internet,⁶⁹ and, to the surprise of some observers and over the dissent of Conservative members, the House of Commons committee charged with reviewing the CBC included a discussion and strong recommendations in favor of net neutrality (in the context of public broadcasting) in its February 2008 report.

Suggestions had been circulated, notably in reports on new media prepared before the 2009 review of the Exemption Order, that ISPs should be required to make a contribution to the development of Canadian content.⁷⁰ This is in some ways a traditional Canadian approach, with many participants in the communications industries having been required to make payments to “talent” funds throughout the history of Canadian broadcasting. Assuming that this approach is workable and that there is political will to pursue it, it does suggest that there may be a potential for a negotiation of a range of issues, including contributions, network neutrality and visibility of or access to Canadian content, as part of an holistic response.

The challenge faced by proponents of this approach was underlined by the submission of the Canadian ISP Association, who reminded the CRTC that “it is important for the Commission to recognize and understand that it does not have the authority under the Broadcasting Act or the Telecommunications Act to impose such a contribution regime on ISPs in furtherance of the broadcasting policy objectives.” The CRTC frequently dismisses such challenges with ease, as it did in the case of BDU carriage fees for over-the-air television⁷¹ and has been at pains to avoid suggesting any limit to its jurisdiction over providers of Internet “Broadcasting Act content” throughout its engagement with new media. However, the CRTC decided in 2009 to seek a firm answer to the question, asking the Federal Court of Appeal to determine the status of ISPs for the purpose of broadcasting and telecommunications legislation. The Court, while not dealing with some broader issues such as the exact definition of broadcasting in the context of the Internet, ruled that ISPs providing an Internet connection to end users are not within the scope of the Broadcasting Act.⁷² This restricts the flexibility of the CRTC in terms of its broadcasting and new media regulatory agenda, but also underlines the relationship between this issue and net neutrality,

with the Court relying (at paragraph 59) upon the neutrality of the ISPs as a factor weighing against regulation through the Act.

LESSONS FROM THE NET NEUTRALITY DEBATES

In Europe, organizations representing the interests of content providers are guarding against “regulation,” on the grounds that it would stifle the growth of Web media. In the United States, similar organizations are petitioning Congress and the FCC for “regulation,” on the ground that failing to regulate will allow some service providers and telecommunications corporations to stifle the growth of Web media. In Canada, the challenge is to connect the various dots in a fashion that recognizes the distinctive features of the Canadian broadcasting and telecommunications systems and is in line with the accepted principles of freedom of expression. In all cases, though, those with various perspectives must surely begin to realize that “medium regulation” is what net neutrality legislation actually is. Therefore, situating the various proposals to regulate (or to self-regulate, or to regulate through architecture, or any other form of regulation) in the context of features of cyberlaw like the role of information, the connection between law and computer science, and the importance of media and cultural studies to the development of the law of the Internet, is a helpful approach.

An essay by Hyde⁷³ on the similarities between 18th Century US controversies on preachers and pulpits is a timely reminder that the issue of net neutrality is not one that should be the sole business of a small group of Internet activists and lobbyists. It is necessary to acknowledge that, while increasingly vehement disagreements between economists on how to stimulate the development of broadband in the United States are undoubtedly important, a broader conversation on the cultural and political impact of new technologies is slowly emerging from the confusion that is net neutrality. There is something poignant about Benjamin Franklin’s idea, cited by Hyde, that a privately-funded lecture hall would “accommodate ... the Inhabitants in general.” It is a simple and elegant notion of public service that can exist in any organizational or regulatory context; an ethos that accommodates the contradictory and puzzling whims of the community is, after all, the

ultimate in (corporate) social responsibility. Yet there also is a strong similarity between the decisions of the debate-favoring friends of Franklin and the millions of hours spent by developers, programmers, moderators, designers, bloggers, and more in building a vibrant, chaotic, and global Internet, including various forms of expression. It is unsurprising, therefore, that there has been significant popular participation on the “pro-neutrality” side, and less so on the opposite side.

On the other hand, it is not accurate to argue that ISPs and content providers/platforms are diametrically opposed. The reaction to the apparent agreement (on some points) between Verizon and Google (as examples of the former and latter respectively) was one of surprise, betrayal, and no small measure of cynicism. Those supporting net neutrality are disappointed that Google may be a less reliable “ally” than they would have assumed. It should not have come as a huge surprise, though. While for those who support a statutory or regulatory basis for net neutrality, the support of the content industry is welcome (particularly from a tactical point of view), the question of the control of content, expression, and innovation by culturally significant (and in certain cases, essentially hegemonic) businesses in the areas of social networking, search, and user-generated content would still be on the table. This is not to suggest that Google has done anything illegitimate, but that the interests of Google are not necessarily synonymous with the interests of organizations that Google may support for a particular period. Net neutrality is part of a spectrum of issues relating to media, speech, and freedom. Indeed, “divided sovereignty” itself, as cited with approval by Hyde, is surely threatened when users must play by the rules of the platform if they wish to interact with their “friends” who have all joined it. Kang and Pasquale (separately) add that it is necessary to prevent a debate on network neutrality becoming solely an economic one, as even the limited problems encountered to date cannot all be classified as economically related. In particular, principles of anti-discrimination law can assist the student of network neutrality, as can studies of the cultural impact of media consolidation.⁷⁴

Lessig argued in *The Future of Ideas*⁷⁵ that cable ISPs (not having common carrier obligations) would be able to discriminate, such as by making video streaming difficult (a particularly relevant fear for

our purposes). He argues that that older approaches in communications law (such as those favoring the freedom to connect devices to the telephone network, as in the *Carterfone* decision) assisted in the development of the Internet, and thus there could be negative consequences for Internet development if such discrimination was put in place. (Subsequently, Zittrain’s more detailed work on generativity considers the connections between restrictions on the use of a system or network and the ability to use it for new and innovative purposes).⁷⁶

“Four freedoms” were set out in a 2004 speech by the then-chair of the FCC, Michael Powell, freedom to access content, use applications, attach devices and obtain service information. A subsequent policy statement, the Internet Policy Statement,⁷⁷ restates them though with significant caveats attached, so for example, the third point is now phrased as an entitlement to connect “legal devices that do not harm the network” and a chapeau-like restriction of the principles being subject to reasonable network management. Now, the formal adoption of these principles, alongside others (most notably non-discrimination), forms part of FCC rule-making, although with a bright line between fixed and mobile services (another point touched on in the Verizon/Google statement) proving divisive.⁷⁸ This process began before the FCC’s defeat in the Comcast appeal, but has gained new urgency (for proponents of net neutrality) since then, as the current status of the Policy Statement appears very weak.

The Commission first found itself dealing with the interpretation of the original statement, in its first response to the complaint against Comcast, which was not a comprehensive net neutrality issue, but an important illustration of the issue.⁷⁹ The activities criticized in these proceedings were the restrictions on the use of peer-to-peer services (specifically, BitTorrent) through intentional (but somewhat secretive) degradation of quality, which had been established by various observers, including the Associated Press.⁸⁰ Again, we see some things in common with the behavior of Virgin and Bell Canada discussed above. After a vigorous investigation, including widely-discussed public proceedings, the Commission found against Comcast, although the statement does seem to approve of certain blocking activities “consistent with federal policy,” such in the case of “illegal content ... or transmissions that violate copyright law.”⁸¹ This is not a full-throated

endorsement of Internet freedom, lest any confusion be caused. However, the case, welcomed by pro-neutrality campaigners as an “historic victory”⁸² should be seen as an important one, not just because of its consequences for Comcast, but also how it made use of the earlier policy statement and suggested that the Commission was moving towards a formal regulatory approach.

In turn, Comcast challenged the decision in federal court, and won an important victory, not strictly on the grounds of any substantive objection to the decision, but instead the legal basis (ancillary jurisdiction) on which the Commission acted. How the matter is ultimately disposed of—whether through judicial determination, the FCC’s December 2010 order, or new legislation—will be an important stage in the development of US policy towards the type of Internet that federal law will prioritize, and should have an impact on the ongoing European Union and Canadian proceedings, each of which have been and continue to be influenced by developments in the United States. The additional dimension in both Europe and Canada is the interaction between telecommunications regulation, Internet policy and the reform of broadcasting law, but the rapid development of the regulator’s role in the United States and the ongoing articulation of the speech-related critique of the gatekeeper role can encourage lawmakers outside the United States to go beyond a debate on transparency or indeed competition.

NOTES

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10. D Mac Sithigh, “The mass age of Internet law” (2008) 17 *Information & Communications Technology Law* 79; Nunziato (n 2) chapter 7.
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12. *Texas v. Johnson*, 491 US 397, 414 (1989) (Brennan J), *US v. Eichmann*, 496 US 310, 319 (1990) (Brennan J).
13. *Handyside v UK* (1976) 1 EHRR 737 [49].
14. Liptak (n 11).
15. “AT&T silences criticism in new terms of service” (*Slashdot* 29 September 2007), <http://yro.slashdot.org/article.pl?sid=07/09/29/104252>.
16. “Telus cuts subscriber access to pro-union Web site” (*CBC News* July 24, 2005) <http://www.cbc.ca/canada/story/2005/07/24/telus-sites050724.html>.
17. Commission for Communications Regulation, “Quarterly key data report : Q2 2010,” http://comreg.ie/_fileupload/publications/ComReg1073.pdf 16.
18. <http://home.eircom.net/policy/>.
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20. The relevant text is: The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
 - The right of the citizens to express freely their convictions and opinions.
 - The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavor to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
 - The publication or utterance of blasphemous, seditious, or indecent matter is an offense which shall be punishable in accordance with law.
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22. *Mahon v. Post Publications*, [2007] IESC 15 [42].
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35. [1998] OJ C 265/2; see generally S Bright, "Application of the EC competition rules to access agreements in the telecommunications sector" (1999) 15 *Computer L & Security Report* 40, 42.
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37. I Walden and J Angel, *Telecommunications Law and Regulation* (Oxford: OUP, 2005) 256-264.
38. Telegeography (n 7).
39. Discussed in detail by N Helberger, Controlling access to content: regulating conditional access in digital broadcasting (The Hague: Kluwer, 2005).
40. See generally Chirico et al (n 36) 22-4.
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42. *NCTA v. Brand X Internet Services*, 545 US 967 (2005). See the criticism of such in Nunziato (n 2) chapter 6.
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44. *Time Warner v. FCC*, 507 F 3d 205 (2007).
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